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v.
THE UNITED STATES.
No. 558.

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BRIEF FOR DEFENDANT IN ERROR.

John Ansbro, plaintiff in error, who is the captain of a steam tug engaged in the business of hauling scows loaded with mud or garbage from the city of New York to be dumped into the sea, was indicted, among other things, for the crime of dumping, on May 1, 1894, in illegal places. He was tried before Judge Benedict and a jury, and convicted October 25, 1894.

There were six counts in the indictment against Ansbro. Three of these were waived by the district attorney and he was acquitted upon two of the others. His conviction was upon the second count alone (pp. 4–7).

The second count of the indictment was based upon the act of June 29, 1888, chapter 496, section 3. This act is entitled, "An act to prevent obstructive and injurious deposits within the harbor and adjacent waters of New York City, by dumping or otherwise, and to punish and prevent such offenses." It relates to the "placing, discharging, or depositing, by any process or in any manner, of refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind, other than that flowing from streets, sewers, and passing therefrom in a liquid state, in the tidal waters of the harbor of New York, or its adjacent or tributary waters, or in those of Long Island Sound, within the limits which shall be prescribed by the supervisor of the harbor" (§ 1).

It provides that the President shall designate a line officer of the Navy as supervisor of the harbor, to act under the direction of the Secretary of War in enforcing the provisions of the act, and in detecting offenders (§ 5).

Section 3, under which Ansbro was convicted, is as follows:

> That in all cases of receiving on board of any scows or boats such forbidden matter or substance as herein described, it shall be the duty of the owner or master, or person acting in such capacity, on board of such scows or boats, before proceeding to take or tow the same to the place of deposit, to apply for and obtain from the supervisor of the harbor appointed hereunder a permit defining the precise limits within which the discharge of such scows or boats may be made; and any deviation from such dumping or discharging place specified in such permit shall be a misdemeanor within the meaning of

this act, and the master and engineer, or person or persons acting in such capacity on board of any tow-boat towing such scows or boats, shall be equally guilty of such offense with the master or person acting in the capacity of master of the scow, and be liable to equal punishment.

The punishment of this misdemeanor is described in sections 1 and 2 of the act, and consists of fines of not less than $250 or more than $500, or imprisonment for not less than thirty days or more than one year, or both.

It will be noticed that the crime is not infamous. In order to bring the case within the jurisdiction of this court the plaintiff in error has alleged in his assignments of error that there are jurisdictional and constitutional questions involved.

THE INDICTMENT.

The second count of the indictment is found at pages 2–7 of the record.

The grand jurors charge that on or about May 1, 1894, the owners of certain scows obtained from the supervisor of the harbor a permit for the steamer *P. H. Wise*, defining the precise limits within which the discharge of such scows or boats might be made (describing these limits), of all of which the defendant had due notice; that defendant was the master of said steamer, and as such master received a permit allowing him to pass with two scows laden with mud and other matter other than that flowing from streets, etc., through the narrows in the lower bay to the Mud Buoy, and dump within the described limits. They further charge that he unlaw-

fully and willfully directed the contents of the scows to be dumped outside of these limits.

The allegations of the indictment are set forth with great particularity and contain also clauses following closely the language of the statute.

STATEMENT OF FACTS.

It was undisputed that John Ansbro, the plaintiff in error, was master of the steam tug *P. H. Wise;* that he obtained a permit for the dumping of four scows (p. 49), including the two scows mentioned in the indictment, within certain named limits, and that these limits were as follows:

> South and east and within half a mile of what is known as the "Mud Buoy," which is a white spar buoy one and a half miles south of Coney Island and located as follows [giving ranges and bearings] (pp. 50, 51).

The scows were what are called "center dumpers," having doors in the bottom which open, so that the stuff drops out (p. 27). It takes about a minute or two to dump their contents (p. 32).

The "Mud Buoy" is a white spar buoy which can be seen sometimes at a distance of 3½ miles. Its location is perfectly well known to boatmen in the lower bay. With ordinary skill a boatman can tie up to it (p. 28).

Its location was changed shortly before the period in question, so that it is not quite in the place marked in the charts previously printed. It was moved about a mile and a quarter northwest (p. 22). There were two reasons for moving it: First, that the mud dumped at

the former location was found to be filling the mouth of the "East Channel;" second, because there was a big hole at the location to which the buoy was moved, which the Navy Department thought should be filled up to prevent a hostile fleet from approaching the shore (p. 28).

The testimony for the Government tended to show that the permit of the *P. H. Wise* was taken up as she went out of the Narrows (p. 29); that she went around through the East Channel, which begins at a point westerly and opens into the ocean at a point southerly from the Mud Buoy, as will be shown by consulting any chart, the nearest point of the channel being 2 miles distant from the buoy, counting in a direct line across the shoal (p. 28); that the scows dumped in the entrance to the East Channel and therefore at least 2 miles from the buoy (pp. 21, 30); that the Government patrol boat, which started around to meet the steam tug as soon as the latter's illegal act was seen, actually met her more than half a mile from the buoy; that Ansbro admitted that he had dumped in an illegal place, and assigned as a reason only that his lines broke and his scows got away (pp. 22, 30); that the water was very smooth, with just a little roll on, and that no broken lines or barges adrift were seen by the Government officers (p. 30).

Captain Ansbro did not deny that the scows were unloaded under his directions, but claimed that the Government testimony was false, and that the dumping was within the prescribed limits (p. 39).

ARGUMENT.

I.

SHOULD THE WRIT BE DISMISSED?

Captain Ansbro's offense is not punishable by imprisonment for a term of over one year or by imprisonment at hard labor. He therefore can not be sentenced to imprisonment in a penitentiary by statute (§§ 5541, 5542). His crime therefore is not an infamous one. (*In re Claasen*, 140 U. S., 200, 204; *In re Bonner*, 151 U. S., 252, 254.) The nature of the misdemeanor is therefore not such as to give the right of review in this court.

Nor does the jurisdictional point suggested in the assignments of error give any right to review in this court, for there is no certificate, as required by the statute. (*Colvin* v. *Jacksonville*, 157 U. S., 368; *Davis Co.* v. *Barber*, id., 673.)

The jurisdiction of this court is therefore sought to be sustained on the ground that this is a "case that involves the construction or application of the Constitution of the United States," and that it is a "case in which the constitutionality of any law of the United States * * * is drawn in question." (Act of March 3, 1891, ch. 517, § 5.)

It will be noticed that no constitutional point appears to have been suggested at the trial. It first appears in the assignments of error. It will also be noticed that the constitutional points are altogether devoid of merit. It is elemental that a single unlawful act may be the ground of prosecution under more than one provision of criminal

law. (*Nielsen, Petitioner*, 131 U. S., 176, 188; *Logan* v. *United States*, 144 U. S., 263, 307; Bishop's Statutory Crimes, § 143.) The suggestion that the statute attempts to provide for punishment of one person for an offense committed by another person is discussed hereinafter. (IX, *infra*.) The rest of the ninth assignment of error substantially raises the point that the statute is unconstitutional, because it fails to require the supervisor of the harbor to place buoys at the limits fixed by him, etc. To this it may be sufficient to answer that the statute requires the permit issued by him to be one "*defining* the *precise* limits," etc. If they are not sufficiently defined, the fault is with the supervisor, not with the statute.

It is also suggested that the sixth amendment of the Constitution is violated, because the crime is alléged to have been committed within the eastern district of New York, while the accused is tried in the southern district of New York. This suggestion is unavailable here, for (while he was tried in the proper district, as will be shown) he waived any objections which he might have had on the question of venue. (IV, *infra*.)

The question is respectfully submitted whether, when no constitutional question is raised at the trial, a constitutional point merely colorable can be inserted in the assignments of error and the case thus taken to this court instead of to the circuit court of appeals. If this be the law, there is a very large number of cases which can be brought directly to this court. For instance, take a case arising under one of our tariff laws, in which the Government has been successful below. If the importer desires

to come to this court with his writ of error, instead of to the circuit court of appeals, all he has to do is to insert among his assignments of error one stating that the tariff law of 1883, or 1890, or 1894, as the case may be, was unconstitutional and void. The Nishimura Ekiu and Horner cases have established a very liberal rule of jurisdiction in cases where constitutional points are suggested. (See also *Carey* v. *Houston and Texas Central Railway*, 150 U. S., 170, 181.) Is it not, however, at least necessary that the constitutional points should be raised at the trial?

II.

ASSIGNMENTS OF ERROR.

We take up the assignments of error *seriatim*:

I–III. These are general charges of error, particularized later.

IV. The fourth assignment of error is as follows:

> That the alleged offense set forth in the second count of said indictment was committed, if at all, within the eastern district of New York, and that by the sixth amendment of the Constitution of the United States the said circuit court of the United States for the southern district of New York is without jurisdiction to try said defendant, etc.

This point is based upon minute verbal criticism of §§ 541 and 542 of the Revised Statutes.

§ 541, after bounding the northern district of New York, proceeds as follows:

> The eastern district includes the counties of Richmond, Kings, Queens, and Suffolk, with the waters

thereof. The southern district includes the residue of said State with the waters thereof.

§ 542 says:

> The district courts of the southern and eastern districts of New York shall have concurrent jurisdiction over the waters within the counties of New York, Kings, Queens, and Suffolk.

By subdivision 20 of § 629 this jurisdiction is extended to the circuit courts.

It is evident, therefore, that while the southern district "includes" all of the State which is not included within the other districts of the State, it also includes certain waters which are likewise within the eastern district, and that to that extent the two districts overlap. Assuming, therefore, that the East Channel was one of the waters belonging to the county of Kings, in the State of New York, it was, nevertheless, within the jurisdiction of the southern as well as of the eastern district of New York.

Is the entrance to the East Channel within the waters of the State of New York, and if so, within the waters of the county of Kings? It is clearly not within any other waters of the eastern district.

The entrance is more than 3 miles from any land in the county of Kings or State of New York, as will be seen by reference to the official chart of the United States Coast Survey, which was used upon the trial. It is within 3 miles of Sandy Hook, a sand-spit belonging to the United States, but within the limits of the State of New Jersey. It is within the limits of New York Harbor as recognized by the political department of this

Government. It is within a line drawn from either Sandy Hook or Navesink Lights to the point at the end of Rockaway Beach. It is, however, in the State of New York and not within the State of New Jersey, because the latter has ceded to the former all its interest in the bay of New York up to its own shore. (See agreement recited at 1 Rev. St. N. Y., 8th ed., p. 131.)

Hence it is in the southern district, if it is not within the county of Kings. But the county of Kings is bounded on the south by the Atlantic Ocean. (Id., p. 240.) Whether this means low-water mark or the 3-mile limit, in either case it excludes the entrance to the East Channel.

It may be suggested—there is no such suggestion in the assignments of error—that the spot is on the high seas. That would not affect the present case, nor would a crime on the high seas come within the sixth amendment to the Constitution at all. It would be properly within the jurisdiction of the circuit court for the southern district of New York in this case under § 730 of the Revised Statutes, because the offender was found within that district. (See Constitution, Art. III, § 2.) It may be suggested that the indictment does not state this with precision. If the indictment is defective in this regard, it is a defect that is cured by the verdict. (Rev. Stat., § 1025.)

Moreover, if a criminal is prosecuted in the wrong district, that is a breach of privilege which he is bound to set up before the trial. (See *Fitzgerald Construction Co.* v. *Fitzgerald*, 137 U. S., 98; *Texas and Pacific Railway Co.* v. *Cox*, 145 U. S., 593, 603.) Very likely defendant

himself preferred to be tried in the southern district. A criminal may waive many points of procedure; for instance, even the objection that the grand jury which indicted him was selected under an unconstitutional law (*United States* v. *Gale*, 109 U. S., 65), or his right to a list of the witnesses against him. (*Hickory* v. *United States*, 151 U. S., 303, 307-8.)

V, VI, VII. It is alleged that the second count of the indictment does not set forth the limits prescribed. This count locates the Mud Buoy by ranges and bearings, and marks out a quadrant within which mud may be dumped, namely, "south and east and within half a mile of" the Mud Buoy. Moreover, defendant having accepted the permit and acting under it, must observe its requirements. To sustain this prosecution it is not necessary to go beyond its terms.

It is also complained that the second count does not set forth in full the order of the supervisor of the harbor defining these limits. It is not necessary that the indictment should set forth evidence. (*Evans* v. *United States*, 153 U. S., 608; *Stokes* v. *United States*, 157 U. S., 187, 191.)

VIII. This seems to require no separate treatment.

IX. This is the constitutional point hereinbefore discussed in connection with the question whether the writ of error was properly taken to this court. The only point insisted upon in the brief now filed is that the act deprives defendant of his liberty and property without due process of law, in that it makes him responsible for

the act of another, he having perhaps no actual knowledge, and therefore no criminal intent.

The first answer to this contention is that it is inapplicable to the present case, since this defendant does not deny that the dumping, wherever it may have been done, was under his direction. Even if the statute goes too far, yet it is valid in so far as it is constitutional; and to avoid its effect defendant must affirmatively bring his case into the outer margin, where the statute fails.

It is submitted, however, that Congress has the power to make the master of a tug responsible, civilly and criminally, for the actions of the scows towed, and that it has exercised that power by the present statute. The statute has no *ex post facto* operation. The master was bound to know the law, and was not bound to assume responsibility for his tow unless he chose to. He adopted his profession with his eyes open, and was at liberty to refuse to tow scows whose crews he could not trust. He could have demanded that one of his own crew be put aboard the scows to see that they should not unload until signaled to do so.

The constitutional amendment relied upon by counsel was not intended to abolish the rule *respondeat superior*. Yet it operates in civil as well as criminal cases. If counsel's contention were well founded, a railroad company could not be made responsible in damages for the tort of an employee, or a partner for that of a copartner.

The rule *respondeat superior* is not novel in criminal law. Thus a sheriff has been made personally responsible for the jailor who is under him (2 Bishop's New Criminal Law, § 1097).

Or the scow men may be regarded not so much persons put by statute under the supervision of the tug master as persons engaged with him in a common enterprise. Certainly, if the enterprise is one which may result in grave detriment to the public interest, Congress can fix responsibility by making each responsible for the actions of the others. Even at common law persons entering into an unlawful combination could be convicted of murder for a homicide committed by any one of them, although no one of the persons convicted may have had any homicidal intent (*Lord Dacre's Case*, 1 Hale, P. C., 439, referred to by Chief Justice Marshall in *United States* v. *Burr*, 4 Cranch, 492); and so of any other unlawful act committed by any conspirator (cas. cit. in *United States* v. *Debs*, 64 Fed. Rep., 724–764). If a mere poacher can be held for a homicide committed by another, surely one engaging in a dangerous business can be made responsible for the missteps of his confederates therein.

Criminal intent is not a necessary ingredient of a statutory crime. (*Commonwealth* v. *Mash*, 7 Mete., 472; *Commonwealth* v. *Emmons*, 98 Mass., 6; *Beckham* v. *Nacke*, 56 Mo., 546.)

In general, it is submitted that Congress may, by legislation operating *in futuro*, regulate any dangerous occupation by making every member of a party engaged in it responsible for the acts of every other. This occupation is certainly dangerous, and within the Federal, rather than the State, jurisdiction to regulate. It tends to fill up the channels which it is the object of appropri-

ations in the river and harbor acts to dredge out, appropriations in aid of operations that are clearly within the Federal sphere, just as are interstate railroad building operations. (*California* v. *Pacific Railroad Co.*, 127 U. S., 1, 39; *Monongahela Navigation Co.* v. *United States*, 148 U. S., 312, 336.)

If a tug master is really subjected to hardship by insubordination of carefully selected assistants or the like, his remedy is with the judge, in application for a light sentence, or with the President, in application for a pardon.

X. It is claimed that the court should have quashed the indictment. The motion to quash was properly denied on the ground that it was made after the jury was impaneled. No error, however, can be assigned to the denial of a motion to quash. (*United States* v. *Rosenburgh*, 7 Wall., 580, 583; *United States* v. *Hamilton*, 109 U. S., 63; *Logan* v. *United States*, 144 U. S., 263, 282.)

XI. It is claimed that a verdict should have been directed at the close of the evidence for the prosecution. Any point of this kind was waived by putting in evidence for the defense. (*Union Pacific Railway Co.* v. *Daniels*, 152 U. S., 684; *Wilson* v. *Haley Live Stock Co.*, 153 U. S., 39; *Runkle* v. *Burnham*, 153 U. S., 216.)

XII. It is claimed that a verdict should have been directed at the close of the testimony. This seems intended to bring up the point that the limits were not sufficiently indicated by the supervisor of the harbor. Counsel seems to think it practicable that a portion of

the ocean should be fenced in. It may be that the supervisor could have used his discretion in such a way as to make it easier for scows to ascertain the boundaries within which they should come. It is submitted, however, that his discretion was not abused in any way. None of defendant's witnesses experience the difficulty which occurs to his counsel. They admit that they knew where the mud buoy was; that they could tow their scows right up to it; that they could even tie to it. There is no need of their attempting to dump on or near the half-mile arc. It was evidently intended that they should dump close to the buoy and in a southeasterly direction from it. The half-mile limit was given so that there might not be the slightest excuse for a failure to dump in the right place. It was not intended that the scow men should take chances on close calculations. The scows and their steam tug can make assurance doubly sure by coming close up to the buoy before they unload. In the present case it is above pointed out that they unloaded at least 2 miles off. Much wider boundaries, altogether unmarked by buoys, were sustained in *United States* v. *The Sadie* (41 Fed. Rep., 396).

XIII, XIV. These assignments of error seem to require no further consideration.

XV. It is claimed that the court should have charged the jury that they must be satisfied beyond a reasonable doubt *from the prosecution's case*. It is because defects in the prosecution's case may be supplied from the testimony for the defense that the courts hold the introduc-

tion of testimony for the defense to be a waiver of the previous motion to direct a verdict of acquittal.

It is respectfully submitted that the writ should be dismissed or the judgment affirmed.

EDWARD B. WHITNEY,
Assistant Attorney General.